Bail Slip

The Accused Viz Ganesan, was directed to be released on bail as per order of this court dated 15.12.1998 and made in Crl.MP.No.10661 of 1998 in Crl.A.No.1058/98 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:05.03.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

CRIMINAL APPEAL No. 1058 of 1998

Ganesan ..Appellant(Accused)

-vs-

State by
Inspector of Police
Villupuram West Police Station
Cr.No.410/94 on the file of
Villupuram West Police Station .. Respondent(Complainant)

This appeal is filed under Section 374(2) Cr.P.C.,against the Judgment passed in S.C.No.206/1997 dated 4.12.1998 on the file of the Court of Principal Sessions Judge,Villupuram.

For appellant : : Mr. K.Veeraraghavan

For respondent: : Mr.G.Saravanan,Addl.Public Prosecutor

JUDGMENT

This appeal has been preferred against the Judgment in S.C.206 of 1997 on the file of the Court of Principal Sessions Judge, Villupuram. The accused is the appellant herein. The accused has been convicted under Section 376 r/w 511 of IPC to undergo five years rigorous imprisonment.

2. The brief facts of the case relevant for deciding this appeal are as follows:
On 13.5.1994 at about 5.30p.m., in the upstairs at door No.54, Hospital Road, Villupuram, the accused with an intention to have

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

sexual intercourse with seven years old child Kalaiarasi had committed an offence of rape, punishable under Section 376(2)(f) I.P.C.

3. The case was taken on file by the learned Judicial Magistrate, No.1, Villupuram as PRC No.25 of 1997 when the accused appeared on summons, copies under Section 207 Cr.P.C. were furnished to the accused and since the case is triable by the Court of Sessions, the learned Judicial Magistrate had committed the case to the Court of Principal Sessions Judge , Villupuram under Section 209 Cr.P.C. After committal, the learned Sessions Judge framed charges under Section 376(2)(f) of IPC and when questioned the accused pleaded not guilty.

4. Before the trial Court, P.Ws 1 to 11 were examined . Exs P1 to P 19,were exhibited and M.Os 1 to 4 were marked. The accused has not examined any witness on his side.

5. P.W,1 is the mother of the victim, who would depose that the occurrence had taken place on 13.5.1994 at about 5.30p.m., and she found her daughter weeping, and when she enquired the little girl informed her that she could not pass urine and that while she was playing , the accused had took her to the up stairs of his house and after removing her inner garments, pressed his face with her genital organ and also she would further depose that her daughter had also informed her that the accused had pressed his male organ into the female organ of the child and that she immediately proceeded to the police station at 10.30p.m., and preferred Ex P1 complaint M.O.1 is the inner garment of the child . M.O.2 is the skirt owned by the victim at the time of occurrence.

5a) P.W.2 is the victim girl. At the time of occurrence, she was seven years of age and at the time of deposing before the Court she was aged nine. To ascertain whether she is capable of giving evidence before the Court of law, the learned Sessions Judge had put several questions to her and after getting satisfied that the child witness is capable of deposing before the Court, the learned trial Judge has permitted her to depose. P.W.2 in her evidence would depose that the occurrence took place some four or five years ago, while she was playing in the evening and that the accused had dragged her hand to the upstairs of his house and after removing her inner garments , he had beaten her all over her body and that he pressed his face on her genital organ and also threatened that if she informs the said occurrence to anybody else, he will beat her and that she came to her house weeping and informed her mother about what had happened and that her mother took her to the police station from where she was referred to the hospital and that Magistrate also examined her.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

5b) P.W.3 is an observation Mahazar witness. He would depose that on 13.5.1994 at about 10.00p.m., the police came to the house of Rajakanthammal and inspected the place of occurrence and prepared Ex P2 Observation Mahazar in which he has signed as a witness. He would further depose that the police have also prepared a rough sketch for the scene of occurrence.

5c). A complaint was registered by P.W.9 under crime No.410 of 1994 of Villupuram West Police Station on 13.5.1994 at about 10.30p.m., under Section 376 IPC Ex P8 is the First Information Report. He has sent P.W.2 to the medical examination. Thereafter, he proceeded to the place of occurrence at about 11.45p.m., and had drawn Ex P9 sketch and also observation Mahazar in the presence of the witnesses. He has examined the witnesses and recorded their statement. He has arrested the accused on 14.5.1994 at 10.00a.m., and has recorded the confession statement under Ex P3 and recovered M.O.4 Lungi and shirt M.O.3 from the accused under Ex P4 Mahazar. He has also examined the other witnesses and recorded their statement. He has sent M.Os 1 to 4 to the Court under Form 95. The accused was referred to medical examination and P.W.2 was also referred for medical examination and later the accused was remanded to the Judicial Custody. Ex P1 is the requisitions dated 17.5.1994 for conducting medical examination for P.W.2. Ex P11 is the letter of requisition of the Judicial Magistrate requesting the Medical Officer to subject P.W.2 for medical examination. Ex P12 is the medical certificate relating to P.W.2. Ex P6 is the requisition made to the Magistrate for sending the accused for medical examination. Ex P13 is the letter written by the Judicial Magistrate to the Medical Officer with a request to examine the accused medically. Ex P14 is the medical report relating to the accused. He gave Ex P15 requisition to the Chief Judicial Magistrate for recording the statement of P.W2 under Section 164 Cr.P.C. He has also examined the witnesses and recorded their statement. Ex P16 is the letter of requisition requesting the Court to send the material objects for chemical examination. Ex P17 is the Court's letter to the forensic Science Laboratory. Ex P18 is the analyst's report.

5d) P.W.4 is an attestor to the confession statement of the accused. Ex P3 is the admissible portion of the confession statement under which M.O.3 shirt and M.O.4 Lungi were recovered by the Investigation Officer in the presence of P.W.4. Ex P4 is the Mahazar under which M.O.3 and M.O.4 were recovered in which P.W.4 is a witness.

5e) P.W.5 is the doctor working as Assistant Surgeon in the Government Hospital, Villuppuram. He would depose that he examined P.W.2 on 13.5.1994 at about 11.15p.m., who was brought

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

by her uncle. He was informed that P.W.2 was raped by known person and on his examination, he could not find any injury on P.W.2 and he has admitted P.W.2 in the hospital for the purpose of examining her with the help of the lady doctor.

5f) P.W.6 is the doctor working as Assistant Surgeon at Government Hospital, Villupuram. According to her, she examined P.W.2 on14.5.1994 in the childlren ward and that P.W.2 has informed her that she was raped by a known person at 5.30p.m., on the previous evening and on her examination, she found the victim's hymen was ruptured and the genital organ was found reddish and there was no semen found on it. There was contusion seen on the external part of her genital organ. Ex P5 is the certificate issued by her. She would further depose that smear of semen of her was sent for chemical examination and there was a report received to the effect that there was nothing found in the swab of the girl. She has further deposed that within 24 hours the potentiality of the semen would have disappeared.

5g) P.W.7 is the Doctor who had examined the accused for the purpose of deciding his potentiality . P.W.7 the doctor has examined the accused on 19.5.1994 on the basis Ex P6 letter of requisition. On his examination, he could not find any injury on the genital organ of the accused and he could found smegma on the male organ of the accused. The tip of the skin of the male organ was found closed on the accused. EX P7 is the certificate issued by the doctor to the effect that the accused is potent to have sexual intercourse.

5h) P.W.8 the then Grade I Constable of Villupuram Police Station would depose that on 2.9.1994, he had delivered a cover containing the material objects relating to this case to the forensic Science Laboratary ,Chennai.

5i) P.W.10 is the subordinate Judge of Thiruvallur. He would depose that while he was working as a Judicial Magistrate No.II, Villupuram, he had recorded the statement of P.W.2 Kalaiarasi under Section 164 Cr.P.C. As per Ex P15 requisition made by the Inspector of Police, on 25.5.1994 at 3.00p.m., after ascertaining the mental capacity of the victim seven years old child Kalaiarasi, he recorded her statement-Ex P19.

5j) P.W.11 is the Inspector of Police who had taken further investigation in this case. He examined other witnesses and recorded their statements and after obtaining the opinion from the Public Prosecutor, has filed the charge sheet on 8.9.1977 under Section 376(2)(f) IPC. He would depose that since P.W.1 has left for Chennai, because of the shame, she had met with due to the occurrence, he could not examine her immediately.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

6) On the above evidence, when incriminating circumstances were put to the accused under Section 313 Cr.P.C., he has denied complicity with the crime.

7) After going through the evidence both oral and documentary, the learned Sessions Judge has come to a conclusion that the guilt against the accused under Section 376(2)(f) IPC was not made out but the accused is liable to be convicted under Section 376 r/w 511 of IPC and accordingly convicted and sentenced the accused to undergo five years rigorous imprisonment under the above provision of law. Aggrieved by the findings of the learned trial judge, the accused has preferred this appeal.

8. The point for determination in this appeal is whether the guilt against the accused under Section 376 r/w 511 IPC has been proved beyond any reasonable doubt to warrant conviction under the said provision of law?.

9. I heard Mr. K.Veeraraghavan, learned Counsel appearing for the appellant and Mr.G.Saravanan, learned Additional Public Prosecutor appearing for the respondent and considered their rival submissions.

10. The Point:
The learned counsel appearing for the appellant would point out several contradictions in the evidence of P.W.1 and P.W.2. P.W.1 is the mother of the victim girl who would depose that P.W.2 has informed that at the time of occurrence, the accused had pressed his face on the genital organ of P.W2 , the minor victim girl and that P.W.2 also informed her that the accused had pressed his genital organ over her(P.W.2) genital organ. When this was confronted with P.W.9, the Inspector of Police who had investigated the case earlier, P.W.9 would depose that during his examination P.W1 has not stated that P.W.2 has not informed that the accused had pressed his face with her genital organ and also the accused has not pressed his male organ with the genital organ of P.W.2. P.W.2 is the minor victim in her evidence has deposed that at the time of occurrence, the accused by holding her hands, dragged her to his up stairs and that after removing her skirt, he had bitten all over her body and that the accused had pressed his face over her genital organ. When this was confronted with P.W.11, the Investigation Officer who is the successor of P.W.9 who had continued his investigation after P.W.9. P.W.11 would depose that in the cross examination that during his investigation, P.W.2 has not stated that the accused had took her to the upstairs but subsequently he would depose that while P.W.2 was playing, the accused had taken her to the upstairs. He would categorically state that P.W.2 has not stated during his

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

investigation that the accused had after removed her skirt had bitten all over her body. If the averments of the prosecution case that the accused had bitten all over the body of the victim, then the Doctor who had examined the victim girl soon after the alleged occurrence would have noticed bite mark on the body of P.W.2. P.W.2 was examined by the doctor ,P.W.5 on 13.5.1994 at about 11.15 p.m., itself in the Government Hospital, Villupuram. He has categorically stated that on examination, he could not find any external injury on the body of P.W.2. Even though P.W.2 before the Court would depose that at the time of occurrence, the accused had pressed his face over her genital organ. When P.W.11 was cross examined on this point, he would controvert by saying that during his examination under Section 161(3) Cr.P.C. P.W.2 has not stated that the accused had pressed his face on her genital organ. Even in Ex P1 complaint, P.W.1 has not alleged that P.W2 her minor daughter has complained that the accused had pressed either his face or his male organ on the genital organ of P.W.2.

11. The learned counsel appearing for the appellant would contend that it is highly not safe to rely on the evidence of child witness because the child is subject to tutoring . In support of his contention, the learned counsel would rely on Bhagwan Singh -vs- State of M.P(2003 Supreme Court Cases (cri) 712) wherein it has been held by the Honourable Apex Court as follows:

> "The law recognises the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the Court to be a witness whose sole testimony can be relied upon without other corroborative evidence. The evidence of a child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the Court looks for adequate corroboration from other evidence to his testimony".

11a) The learned counsel appearing for the appellant would draw the attention of this Court that according to P.W.1, as per Ex P2 Observation Mahazar, the occurrence had taken place on the upstairs of one Rakkathammal and there is an old Hardware shop on the right hand side of Rakkathammal's house is situate and on the south of the said house a fire station is situate and about 30 feet away from the said house, there is a petrol bunk and 200 feet away from the bunk , there is a manure shop and a departmental store are situated. The learned counsel would contend that in

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

this case, there is no independent witness examined on the side of the prosecution to prove that the accused had dragged the child from the play field to the upstairs of his house and that the non examination of the independent witness is fatal to the case of the prosecution. In support of his contention, the learned counsel would rely on Hemraj and others-vs-State of Haryana(2005 SCC(Cri) 1646 wherein it has been held by the Honourable Apex Court as follows:

> " The fact that no independent witness though available, was examined and not even an explanation was sought to be given for not examining such witness is a serious infirmity in the prosecution case having regard to the indisputable facts of this case."

12. P.W.11, the Investigation Officer in his cross examination would depose that he has not examined any shop owner or house owners available nearby to the place of occurrence.

13. Yet another important thing to be noted in this case is that P.W.6 the Doctor who has examined the minor victim girl on 14.5.1994 ie., one day after the occurrence would depose that at the time of her examination, she found the hymen of the victim girl ruptured. So the prosecution must link the accused to the effect that the accused alone was responsible for the rupture of the hymen of the victim girl. The only evidence available in this case is the confession statement of the accused Ex P3. In Ex P3, the accused would state that the victim girl alone was playing in the upstairs and that he had developed a desire of having intercourse with her and hence he compelled her and he has attempted to rape her and at that time, there was an ejaculation of semen which fell on his clothes as well as on the inner garments of the child and at that time the girl raised alarm and requested him to spare her. So he left her. In this case, no analyst was examined. Ex P18 is the analyst's report. The analyst had analysed the shirt (M.O.3)of the accused and the lungi(M.O.4) of the accused and also the brown jetty(M.O1) and silk frock (M.O.2). Out of M.O.1 to M.O.4, Items 1 and 2 are recovered from the accused on his confession and Items 3 and 4 are the apparels of P.W.2 handed over by P.W.4. Ex P18 report reads that neither blood nor semen was detected in any of the above said items. There is absolutely no evidence to the effect that the above said M.O.1 to M.O.4 were washed after the occurrence. Under such circumstances, the absence of semen in M.O.1 Brown jetty of the Victim girl will go to show that the confession statement Ex P3, is of no use to the case of the prosecution to bring home the guilt of the accused beyond any reasonable doubt.

14. Even though the case as projected by the prosecution seems to be a heinous in nature, without any evidence to connect

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

the accused with the crime, it is not safe to convict the accused . The principle of legal Jurisprudence is even 1000 accused can be acquitted but one innocent accused cannot be convicted. While answering under Section 313 Cr.P.C., the accused would say that he is in enmical terms with the Periyarajakanthammal and that civil suit is pending between him and her.

15. According to the prosecution, the alleged occurrence had taken place only in the upstairs of the house of Rajakanthammal. The fact that there was rupture in the hymen of the victim girl, in the absence of any evidence to link the accused to the effect that only the accused is responsible for the said rupture, it is not safe to convict the accused on surmises and presumptions which have no play in a criminal case.

16.Under such circumstances, I constrained to record my displeasure against the police in the investigation of this case. Before filing a charge sheet, the investigation officer would have left no stone unturned in exploring all the possible circumstances to bring home in the guilt against the accused beyond any reasonable doubt which the investigation Officer in this case has failed to do so. The prosecution has failed to prove the guilt of the accused under Section 376 r/w 511 IPC to warrant conviction under the said provisions of law which certainly enure to the benefit of the accused. Point is answered accordingly.

17. In the result,this appeal is allowed, setting aside the conviction and sentence imposed on the appellant in S.C.No.206 of 1997 on the file of the Court of Principal Sessions Judge, Villupuram and the accused is set at liberty forthwith. The appellant is acquitted from the charge levelled against him. The bail bond shall stand cancelled.

sg

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Principal Sessions Judge,Villupuram (with recors)

2. The Judicial Magistrate No.1, Villupuram.

3. Do Through The CJM, Villupuram.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

4. The Inspector of Police,Villupuram West Police Station,

5. The Superintendent, Central Prison, Cuddalore.

6. The Public Prosecutor, High Court, Madras.

Crl.A.No. 1058/1998

AKM(CO)
SR/16.8.2007

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/